

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CARLOS AGUIRRE,

Petitioner,

-against-

J.M. KILLIAN,

Respondent.
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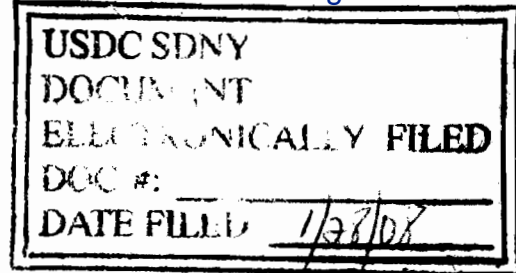
TO: HON. LAURA T. SWAIN, UNITED STATES DISTRICT JUDGE

FROM: THEODORE H. KATZ, UNITED STATES MAGISTRATE JUDGE.

Petitioner, Carlos Aguirre, initiated this habeas corpus proceeding, pursuant to 28 U.S.C. § 2241, on November 5, 2007.¹ In his Petition, Aguirre claims that officials at the Federal Correctional Institution at Otisville, New York ("FCI Otisville") improperly denied him access to residential drug treatment programs, thereby preventing his early release from prison. Petitioner contends that the judge who sentenced him either ordered or requested that he be placed in a drug treatment program while incarcerated.² Petitioner asserts that there is no longer time for him to renew his application for the drug treatment programs, and, thus, he seeks a reduction or "downward departure" in his sentence.

¹ The Petition was received by the Court's Pro Se Office on November 5, 2007.

² In fact, the transcript of Petitioner's sentencing hearing indicates that the sentencing judge merely agreed to suggest that Petitioner be placed in a drug treatment program. (See Transcript of Sentencing Proceeding, dated Jan. 24, 2005, at 14, attached as an exhibit to the Petition.)



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(See Petition, dated Oct. 29, 2007, at 5c.)

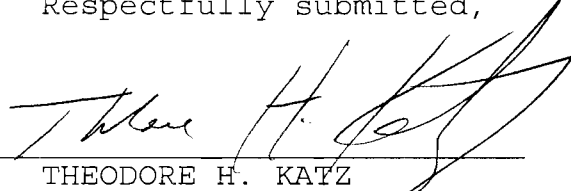
It is apparent from the face of the Petition that Petitioner is seeking relief that this Court does not have jurisdiction to grant. Petitioner was sentenced, in January of 2005, to forty-eight months of imprisonment, following his conviction for participation in a drug conspiracy. He pled guilty before, and was sentenced by, the Hon. D.R. Debevoise, United States District Judge for the District of New Jersey. Even if there is some basis for a court to exercise its discretion in order to effect a reduction in Petitioner's sentence (a proposition that this Court doubts, but need not resolve), any such discretion lies with the court that sentenced Petitioner, not with this Court.

Accordingly, this Court recommends that Petitioner be allowed twenty-one (21) days to withdraw his Petition, so that he can commence an appropriate proceeding in the District of New Jersey. (By voluntarily withdrawing the action, Petition may avoid a future claim that a subsequent proceeding is a second or successive application for habeas relief.) If Petitioner has not withdrawn the action within that time, the Court recommends that the action be dismissed without prejudice.

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72 of the Federal Rules of Civil Procedure, Petitioner shall have ten (10) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6(a) and (e). Such objections shall be filed

with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Laura T. Swain, United States District Judge, and to the chambers of the undersigned, Room 1660. Any requests for an extension of time for filing objections must be directed to Judge Swain. Failure to file objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140, 145, 106 S. Ct. 466, 470 (1985); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

Respectfully submitted,



THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE

Dated: January 28, 2008
New York, New York